



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OAR-2014-0060; FRL-9927-30-OAR]

California State Nonroad Engine Pollution Control Standards; Mobile Cargo Handling Equipment at Ports and Intermodal Rail Yards Regulations; Notice of Decision

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Decision

SUMMARY: The Environmental Protection Agency (“EPA”) is granting the California Air Resources Board’s (“CARB”) request for authorization of amendments to its mobile cargo handling equipment at ports and intermodal rail yards regulations (“CHE amendments”). EPA is also confirming that certain CHE amendments are within the scope of prior EPA authorizations. CARB’s mobile cargo handling equipment at ports and intermodal rail yard regulations apply to all newly purchased, leased or rented on- and off-road vehicles and equipment, as well as in-use on- and off-road vehicles and equipment, with compression-ignition engines that operate at ports and intermodal rail yards. This decision is issued under the authority of the Clean Air Act (“CAA” or “Act”).

DATES: Petitions for review must be filed by **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: EPA has established a docket for this action under Docket ID EPA-HQ-OAR-2014-0060. All documents relied upon in making this decision, including those submitted to EPA by CARB, are contained in the public docket. Publicly available docket materials are available either electronically through www.regulations.gov or in hard copy

at the Air and Radiation Docket in the EPA Headquarters Library, EPA West Building, Room 3334, located at 1301 Constitution Avenue, NW, Washington, DC. The Public Reading Room is open to the public on all federal government working days from 8:30 a.m. to 4:30 p.m.; generally, it is open Monday through Friday, excluding holidays. The telephone number for the Reading Room is (202) 566-1744. The Air and Radiation Docket and Information Center's website is <http://www.epa.gov/oar/docket.html>. The electronic mail (e-mail) address for the Air and Radiation Docket is: a-and-r-Docket@epa.gov, the telephone number is (202) 566-1742, and the fax number is (202) 566-9744. An electronic version of the public docket is available through the federal government's electronic public docket and comment system. You may access EPA dockets at <http://www.regulations.gov>. After opening the www.regulations.gov website, enter EPA-HQ-OAR-2014-0060 in the "Enter Keyword or ID" fill-in box to view documents in the record. Although a part of the official docket, the public docket does not include Confidential Business Information ("CBI") or other information whose disclosure is restricted by statute.

EPA's Office of Transportation and Air Quality ("OTAQ") maintains a webpage that contains general information on its review of California waiver and authorization requests. Included on that page are links to prior waiver *Federal Register* notices, some of which are cited in today's notice; the page can be accessed at <http://www.epa.gov/otaq/cafr.htm>.

FOR FURTHER INFORMATION CONTACT: David Dickinson, Attorney-Advisor, Compliance Division, Office of Transportation and Air Quality, U.S. Environmental

Protection Agency, 1200 Pennsylvania Ave, NW, Washington, DC20460. Telephone: (202)343-9256. Fax: (202)343-2804. Email: dickinson.david@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

CARB first adopted its CHE regulation on December 31, 2006. The regulation applied to newly purchased, leased, or rented on- and off-road vehicles and equipment, as well as to in-use on- and off-road vehicles and equipment with compression-ignition (CI) engines that operate at ports and intermodal rail yards.¹ On February 21, 2012, EPA granted California a full waiver for those parts of the CHE regulation establishing emission standards for new on-road motor vehicles and full authorization for standards and other requirements related to the control of emissions affecting new and in-use nonroad engines.² CARB formally adopted the CHE amendments on October 14, 2012,³ and they are codified at title 13, California Code of Regulations (CCR), section 2479. The CHE amendments modify certain retrofit, operational, and compliance requirements; strengthen certain emission standards; and address definitions and provide other clarifying language. By letter dated May 16, 2013, CARB submitted a request to EPA pursuant to section 209(e) of the Act, seeking EPA's confirmation that certain CHE amendments fall within the scope of EPA's February 2012 authorization and a full authorization for other CHE amendments. Those CHE amendments for which CARB sought within-the-scope confirmation are related to compliance flexibility and reduced compliance costs and include: modification to retrofit requirements and operational practices; demonstration of emissions equivalency for alternative technology; and

¹ The federal term "nonroad" and the California term "off-road" are used interchangeably.

² 77 FR 9916 (February 21, 2012).

³ CARB "Resolution 11-30," September 22, 2011; CARB "Executive Order R-12-009," August 2, 2012.

modification of certain compliance requirements. CARB sought a full authorization for the CHE amendments related to new, more stringent requirements and include: a new opacity based monitoring program for in-use nonroad vehicles and equipment; and, a new retrofit requirement for engines meeting the Tier 4 Family Emissions Limit standards.

A. Clean Air Act Nonroad Engine and Vehicle Authorizations

Section 209(e)(1) of the Act permanently preempts any state, or political subdivision thereof, from adopting or attempting to enforce any standard or other requirement relating to the control of emissions for certain *new* nonroad engines or vehicles.⁴ For all other nonroad engines (including “non-new” engines), states generally are preempted from adopting and enforcing standards and other requirements relating to the control of emissions, except that section 209(e)(2)(A) of the Act requires EPA, after notice and opportunity for public hearing, to authorize California to adopt and enforce such regulations unless EPA makes one of three enumerated findings. Specifically, EPA must deny authorization if the Administrator finds that (1) California’s protectiveness determination (i.e., that California standards will be, in the aggregate, as protective of public health and welfare as applicable federal standards) is arbitrary and capricious, (2) California does not need such standards to meet compelling and extraordinary conditions, or (3) the California standards and accompanying enforcement procedures are not consistent with section 209 of the Act.

On July 20, 1994, EPA promulgated a rule interpreting the three criteria set forth in section 209(e)(2)(A) that EPA must consider before granting any California

⁴ States are expressly preempted from adopting or attempting to enforce any standard or other requirement relating to the control of emissions from new nonroad engines which are used in construction equipment or vehicles or used in farm equipment or vehicles and which are smaller than 175 horsepower. Such express preemption under section 209(e)(1) of the Act also applies to new locomotives or new engines used in locomotives.

authorization request for nonroad engine or vehicle emission standards.⁵ EPA revised these regulations in 1997.⁶ As stated in the preamble to the 1994 rule, EPA historically has interpreted the consistency inquiry under the third criterion, outlined above and set forth in section 209(e)(2)(A)(iii), to require, at minimum, that California standards and enforcement procedures be consistent with section 209(a), section 209(e)(1), and section 209(b)(1)(C) of the Act.⁷

In order to be consistent with section 209(a), California's nonroad standards and enforcement procedures must not apply to new motor vehicles or new motor vehicle engines. To be consistent with section 209(e)(1), California's nonroad standards and enforcement procedures must not attempt to regulate engine categories that are permanently preempted from state regulation. To determine consistency with section 209(b)(1)(C), EPA typically reviews nonroad authorization requests under the same "consistency" criteria that are applied to motor vehicle waiver requests under section 209(b)(1)(C). That provision provides that the Administrator shall not grant California a motor vehicle waiver if she finds that California "standards and accompanying enforcement procedures are not consistent with section 202(a)" of the Act. Previous decisions granting waivers and authorizations have noted that state standards and enforcement procedures will be found to be inconsistent with section 202(a) if (1) there is inadequate lead time to permit the development of the necessary technology, giving

⁵ See "Air Pollution Control; Preemption of State Regulation for Nonroad Engine and Vehicle Standards," 59 FR 36969 (July 20, 1994).

⁶ See "Control of Air Pollution: Emission Standards for New Nonroad Compression-Ignition Engines at or Above 37 Kilowatts; Preemption of State Regulation for Nonroad Engine and Vehicle Standards; Amendments to Rules," 62 FR 67733 (December 30, 1997). The applicable regulations are now found in 40 CFR part 1074, subpart B, section 1074.105.

⁷ See *supra* note 12. EPA has interpreted 209(b)(1)(C) in the context of section 209(b) motor vehicle waivers.

appropriate consideration to the cost of compliance within that time, or (2) the federal and state testing procedures impose inconsistent certification requirements.

In light of the similar language of sections 209(b) and 209(e)(2)(A), EPA has reviewed California's requests for authorization of nonroad vehicle or engine standards under section 209(e)(2)(A) using the same principles that it has historically applied in reviewing requests for waivers of preemption for new motor vehicle or new motor vehicle engine standards under section 209(b).⁸ These principles include, among other things, that EPA should limit its inquiry to the three specific authorization criteria identified in section 209(e)(2)(A),⁹ and that EPA should give substantial deference to the policy judgments California has made in adopting its regulations. In previous waiver decisions, EPA has stated that Congress intended EPA's review of California's decision-making be narrow. EPA has rejected arguments that are not specified in the statute as grounds for denying a waiver:

The law makes it clear that the waiver requests cannot be denied unless the specific findings designated in the statute can properly be made. The issue of whether a proposed California requirement is likely to result in only marginal improvement in California air quality not commensurate with its costs or is otherwise an arguably unwise exercise of regulatory power is not legally pertinent to my decision under section 209, so long as the California requirement is consistent with section 202(a) and is more stringent than applicable Federal requirements in the sense that it may result in some further reduction in air pollution in California.¹⁰

⁸ See *Engine Manufacturers Association v. EPA*, 88 F.3d 1075, 1087 (D.C. Cir. 1996): "... EPA was within the bounds of permissible construction in analogizing §209(e) on nonroad sources to §209(a) on motor vehicles."

⁹ See *supra* note 12, at 36983.

¹⁰ "Waiver of Application of Clean Air Act to California State Standards," 36 FR 17458 (Aug. 31, 1971). Note that the more stringent standard expressed here, in 1971, was superseded by the 1977 amendments to section 209, which established that California must determine that its standards are, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. In the 1990 amendments to section 209, Congress established section 209(e) and similar language in section 209(e)(1)(i) pertaining to California's nonroad emission standards which California must determine to be, in the aggregate, at least as protective of public health and welfare as applicable federal standards.

This principle of narrow EPA review has been upheld by the U.S. Court of Appeals for the District of Columbia Circuit.¹¹ Thus, EPA's consideration of all the evidence submitted concerning an authorization decision is circumscribed by its relevance to those questions that may be considered under section 209(e)(2)(A).

If California amends regulations that were previously authorized by EPA, California may ask EPA to determine that the amendments are within the scope of the earlier authorization. A within-the-scope determination for such amendments is permissible without a full authorization review if three conditions are met. First, the amended regulations must not undermine California's previous determination that its standards, in the aggregate, are as protective of public health and welfare as applicable federal standards. Second, the amended regulations must not affect consistency with section 209 of the Act, following the same criteria discussed above in the context of full authorizations. Third, the amended regulations must not raise any "new issues" affecting EPA's prior authorizations.¹²

B. Deference to California

In previous waiver decisions, EPA has recognized that the intent of Congress in creating a limited review based on the section 209(b)(1) criteria was to ensure that the federal government did not second-guess state policy choices. As the agency explained in one prior waiver decision:

It is worth noting * * * I would feel constrained to approve a California approach to the problem which I might also feel unable to adopt at the federal level in my own capacity as a regulator. The whole approach of the Clean Air Act is to force the development of new types of emission control technology where that is needed by compelling the industry to

¹¹ See, e.g., *Motor and Equip. Mfrs Assoc. v. EPA*, 627 F.2d 1095 (D.C. Cir. 1979) ("MEMA I").

¹² See "California State Motor Vehicle Pollution Control Standards; Amendments Within the Scope of Previous Waiver of Federal Preemption," 46 FR 36742 (July 15, 1981).

“catch up” to some degree with newly promulgated standards. Such an approach * * * may be attended with costs, in the shape of reduced product offering, or price or fuel economy penalties, and by risks that a wider number of vehicle classes may not be able to complete their development work in time. Since a balancing of these risks and costs against the potential benefits from reduced emissions is a central policy decision for any regulatory agency under the statutory scheme outlined above, I believe I am required to give very substantial deference to California’s judgments on this score.¹³

Similarly, EPA has stated that the text, structure, and history of the California waiver provision clearly indicate both a congressional intent and appropriate EPA practice of leaving the decision on “ambiguous and controversial matters of public policy” to California’s judgment.¹⁴ This interpretation is supported by relevant discussion in the House Committee Report for the 1977 amendments to the Clean Air Act.¹⁵ Congress had the opportunity through the 1977 amendments to restrict the preexisting waiver provision, but elected instead to expand California’s flexibility to adopt a complete program of motor vehicle emission controls. The report explains that the amendment is intended to ratify and strengthen the preexisting California waiver provision and to affirm the underlying intent of that provision, that is, to afford California the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare.¹⁶

C. Burden and Standard of Proof

As the U.S. Court of Appeals for the D.C. Circuit has made clear in *MEMA I*, opponents of a waiver request by California bear the burden of showing that the statutory criteria for a denial of the request have been met:

¹³ 40 FR 23102, 23103-23104 (May 28, 1975).

¹⁴ *Id.* at 23104; 58 FR 4166 (January 13, 1993).

¹⁵ *MEMA I*, 627 F.2d at 1110 (*citing* H.R. Rep. No. 294, 95th Cong., 1st Sess. 301-302 (1977)).

¹⁶ *Id.*

[T]he language of the statute and its legislative history indicate that California's regulations, and California's determinations that they must comply with the statute, when presented to the Administrator are presumed to satisfy the waiver requirements and that the burden of proving otherwise is on whoever attacks them. California must present its regulations and findings at the hearing and thereafter the parties opposing the waiver request bear the burden of persuading the Administrator that the waiver request should be denied.¹⁷

The Administrator's burden, on the other hand, is to make a reasonable evaluation of the information in the record in coming to the waiver decision. As the court in *MEMA I* stated: "here, too, if the Administrator ignores evidence demonstrating that the waiver should not be granted, or if he seeks to overcome that evidence with unsupported assumptions of his own, he runs the risk of having his waiver decision set aside as 'arbitrary and capricious.'"¹⁸ Therefore, the Administrator's burden is to act "reasonably."¹⁹

With regard to the standard of proof, the court in *MEMA I* explained that the Administrator's role in a section 209 proceeding is to:

[...]consider all evidence that passes the threshold test of materiality and *
* * * thereafter assess such material evidence against a standard of proof to determine whether the parties favoring a denial of the waiver have shown that the factual circumstances exist in which Congress intended a denial of the waiver.²⁰

In that decision, the court considered the standards of proof under section 209 for the two findings related to granting a waiver for an "accompanying enforcement procedure." Those findings involve: (1) whether the enforcement procedures impact California's prior protectiveness determination for the associated standards, and (2) whether the procedures are consistent with section 202(a). The principles set forth by the court, however, are

¹⁷ *MEMA I*, *supra* note 19, at 1121.

¹⁸ *Id.* at 1126.

¹⁹ *Id.* at 1126.

²⁰ *Id.* at 1122.

similarly applicable to an EPA review of a request for a waiver of preemption for a standard. The court instructed that “the standard of proof must take account of the nature of the risk of error involved in any given decision, and it therefore varies with the finding involved. We need not decide how this standard operates in every waiver decision.”²¹

With regard to the protectiveness finding, the court upheld the Administrator’s position that, to deny a waiver, there must be “clear and compelling evidence” to show that proposed enforcement procedures undermine the protectiveness of California’s standards.²² The court noted that this standard of proof also accords with the congressional intent to provide California with the broadest possible discretion in setting regulations it finds protective of the public health and welfare.²³

With respect to the consistency finding, the court did not articulate a standard of proof applicable to all proceedings, but found that the opponents of the waiver were unable to meet their burden of proof even if the standard were a mere preponderance of the evidence. Although *MEMA I* did not explicitly consider the standards of proof under section 209 concerning a waiver request for “standards,” as compared to a waiver request for accompanying enforcement procedures, there is nothing in the opinion to suggest that the court’s analysis would not apply with equal force to such determinations. EPA’s past waiver decisions have consistently made clear that: “[E]ven in the two areas concededly reserved for Federal judgment by this legislation – the existence of ‘compelling and extraordinary’ conditions and whether the standards are technologically feasible –

²¹ *Id.*

²² *Id.*

²³ *Id.*

Congress intended that the standards of EPA review of the State decision to be a narrow one.”²⁴

D. EPA’s Administrative Process in Consideration of California’s CHE Amendment Request for Authorization

On May 28, 2014, EPA published a *Federal Register* notice announcing its receipt of California’s authorization request. In that notice, EPA invited public comment on each of the CHE amendments and an opportunity to request a public hearing.²⁵

First, EPA requested comment on the CHE amendments, as follows: (1) Should California’s CHE amendments be considered under the within-the-scope analysis, or should they be considered under the full authorization criteria?; (2) If those amendments should be considered as a within-the-scope request, do they meet the criteria for EPA to grant a within-the-scope confirmation?; and (3) If the amendments should not be considered under the within-the-scope analysis, or in the event that EPA determines they are not within the scope of the previous authorization, do they meet the criteria for full authorization?

EPA received one anonymous written comment that opposed “any new Regulation or Rule promulgated by EPA on California State Non Road Engine Pollution Control Standards: Mobile Cargo Handling Equipment at Ports and Intermodal Rail Yards Regulations.”²⁶ EPA is not promulgating any regulations or rules regarding California’s CHE regulations, but rather is adjudicating whether or not the amendments that CARB made to its own CHE regulations are within the scope of previous

²⁴ See, e.g., “California State Motor Vehicle Pollution Control Standards; Waiver of Federal Preemption,” 40 FR 23102 (May 28, 1975), at 23103.

²⁵ See “California State Nonroad Engine Pollution Control Standards; Mobile Cargo Handling Equipment at Ports and Intermodal Rail Yards Regulation; Request for Within-the-Scope and Full Authorization; Opportunity for Public Hearing and Comment,” 79 FR 30608 (May 28, 2014).

²⁶ See EPA-HQ-OAR-2014-0060-0019.

authorizations granted by EPA or fulfill the criteria for a full authorization under the Clean Air Act. EPA received no requests for a public hearing. Consequently, EPA did not hold a public hearing.

II. Discussion

The CHE amendment package contains six categories of amendments. CARB seeks within-the-scope confirmation for the following amendments: (1) modification to retrofit requirements; (2) modification of operation practices; (3) allowance of demonstration of emissions equivalency for alternative technology; and (4) modification of compliance requirements. CARB seeks a full authorization to enforce amendments that establish: (1) a new opacity based monitoring program; and (2) new retrofit requirements for engines meeting the Tier 4 Family Emission Limits standards.

A. Within-the-Scope Discussion

California maintains that many of the CHE amendments were enacted to address a variety of implementation issues associated with the initial CHE regulations. CARB asserts that the amendments provide additional compliance flexibilities without sacrificing significant emission reductions.

CARB's amendments to the retrofit requirements allow additional time for fleet owners/operators (fleets) to retrofit equipment for which no verified diesel emission control strategies (VDECS) are available. The retrofit amendments also add safety as a criterion for assessing VDECS availability, allow additional time to request a compliance date extension, and allow an extension of the time for the use of experimental diesel particulate matter emissions control strategies for the purpose of gathering verification data on such strategies.

According to CARB, the amendments that modify the operational practice requirements involve four minor adjustments to the CHE regulations. These include a low-use compliance extension (a two-year extension for equipment that operates less than 200 hours per year), an allowance for cargo handling equipment other than yard trucks (“non-truck CHE”), owned or leased by one party to be transferred to another location under certain limitations, an allowance for fleets to replace engines still under the original equipment manufacturer’s warranty with replacement engines that meet the emission standards of the original engine, even when newer engine emission standards are in place for newly produced engines, and a new provision allowing fleets to rent non-compliant equipment in the event that compliant equipment is unavailable due to manufacturer delivery delays.

The third set of amendments that CARB maintains are within the scope of the prior authorization establishes a compliance option that allows fleets to demonstrate emissions equivalency for alternative technology. CARB states that these amendments are designed to encourage introduction of new technologies such as hybrid and electric equipment.

Finally, the fourth set of amendments modifies compliance requirements by establishing a compliance schedule that allows fleets to bring older engines into compliance first if owners and operators choose to do so, and by exempting equipment at rural low-throughput ports.²⁷

CARB maintains that the amendments noted above meet all three within-the-scope criteria, i.e. that the amendments: (1) do not undermine the original protectiveness

²⁷ The exemption applies if the average annual throughput of goods through a port is less than one million tons and the port is located more than 75 miles from an urban area.

determination underlying California's CHE regulations; (2) do not affect the consistency of the CHE regulations with section 209, and (3) do not raise any new issues affecting the prior authorizations.²⁸ We received no adverse comments or evidence suggesting a within-the-scope analysis is inappropriate, or that these CHE amendments fail to meet any of the three criteria for within-the-scope confirmation.

With regard to the first within-the-scope prong, CARB maintains that the stringency of its emission standards is, in the aggregate, at least as protective of public health and welfare as applicable federal standards.²⁹ CARB also notes that its amendments will not create any expected adverse environmental impacts.³⁰ Finally, CARB notes that there can be no question that the CHE regulations are at least as protective of public health and welfare as applicable federal standards given that EPA is unable to regulate emissions from in-use nonroad engines and equipment and that no federally applicable regulations exist. EPA agrees that there are no federally applicable standards for in-use nonroad engines and that no evidence exists in the record to demonstrate that CARB's CHE regulations, in the aggregate, are less protective than applicable federal standards. Therefore, we cannot find that the CHE amendments, as noted, undermine the protectiveness determination made with regard to the original CHE authorization.

With regard to the second within-the-scope prong (consistency with section 209), CARB maintains that the CHE amendments do not regulate new motor vehicles or motor vehicles engines and so are consistent with section 209(a). Likewise the CHE amendments do not regulate any of the permanently preempted categories of engines or

²⁸ *Id.* at 16.

²⁹ See CARB Board Resolution 11-30 (enclosure 4 of CARB's authorization request).

³⁰ See CARB Staff Report (enclosure 2 of CARB's authorization request).

vehicles, and so are consistent with section 209(e)(1). Finally, CARB maintains that the CHE amendments do not cause any technological feasibility issues or cause inconsistency between state and federal test procedures, per section 209(b)(1)(C). CARB maintains that the CHE amendments, as noted, provide additional compliance flexibilities beyond the CHE regulations already found to be technologically feasible. Because there is no evidence in the record to indicate that CARB's CHE amendments are inconsistent with section 209 we cannot find that the CHE amendments, as noted, are inconsistent with section 209.

Third, California states that no new issues exist, and EPA has received no evidence to the contrary.³¹ We therefore do not find any new issues raised by the CHE amendments as noted.

Having received no contrary evidence regarding these amendments, we find that California has met the three criteria for a within-the-scope authorization approval, and these amendments are thus confirmed as within the scope of previous EPA authorizations of California's CHE regulations.

B. Full Authorization Discussion

As noted above, CARB seeks a full authorization to enforce amendments that establish a new opacity based monitoring program and new retrofit requirements for engines meeting the Tier 4 Family Emission Limits standards.

CARB's CHE amendments establish new in-use opacity standards and require owners/operators to conduct annual opacity monitoring of all CHE more than four years old from the date of its original manufacture to ensure proper operation and maintenance so that engines continue to perform as designed and certified. Retrofitted engines are

³¹ CARB authorization support document at 14, docket entry EPA-HQ-OAR-2014-0060-0003.

similarly monitored to ensure that the engines continue to be in compliance with the VDECS executive order issued by CARB. Equipment found to be in excess of opacity standards would be required to receive maintenance and repair before being returned to service.

Under the CHE regulation that EPA previously authorized, engine manufacturers are allowed some flexibility during periods in which emission standards are transitioning from one emission level (tier) to another emission level (tier). This flexibility allows engine manufacturers to certify a certain percentage of engines manufactured, and identified as being part of the more stringent tier, to emission levels that do not meet that more stringent tier. CARB established a family emission limit (FEL) alternate particulate matter (PM) emission standard (Tier 4 Alternate PM standard) that is essentially equivalent to the less stringent Tier 3 PM emission standard. The Tier 4 Alternate PM standard is about ten times higher than the otherwise applicable Tier 4 PM standard. Through inadvertent error by CARB, the CHE regulations allowed for in-use nonroad non-truck CHE to meet the applicable upgrade requirements by meeting the Tier 4 Alternate PM standard rather than the Tier 4 PM standard. CARB's CHE amendments correct this error by requiring fleets that used the FEL-certified engines to retrofit these engines with the highest available (best – Tier 4) VDECS within one year.

With regard to the first full authorization prong at section 209(e)(2)(i) of the Act, CARB maintains that the stringency of its emission standards is, in the aggregate, at least as protective of public health and welfare as applicable federal standards.³² CARB also notes that its amendments will not create any expected adverse environmental impacts.³³

³² See CARB Board Resolution 11-30 (enclosure 4 of CARB's authorization request).

³³ See CARB Staff Report (enclosure 2 of CARB's authorization request).

Finally, CARB notes that there can be no question that its CHE regulation is at least as protective of public health and welfare as applicable federal standards given that EPA is unable to regulate emissions from in-use nonroad engines and equipment and that no federally applicable regulations exist. EPA agrees that there are no federally applicable standards for in-use nonroad engines and that no evidence exists in the record to demonstrate that CARB's CHE regulation is less protective, in the aggregate, than applicable federal standards. Accordingly, we cannot find that CARB's protectiveness finding is arbitrary and capricious.

With regard to the second authorization criterion, section 209(e)(2)(A)(ii) instructs that EPA cannot grant an authorization if the Agency finds that California "does not need such California standards to meet compelling and extraordinary conditions." EPA's inquiry under this second criterion (found both in paragraphs 209(b)(1)(B) and 209(e)(2)(A)(ii)) has been to determine whether California needs its own mobile source pollution program (i.e. set of standards) for the relevant class or category of vehicles or engines to meet compelling and extraordinary conditions, and not whether the specific standards that are the subject of the authorization or waiver request are necessary to meet such conditions.³⁴ CARB notes that in adopting its CHE amendments the CARB Board confirmed its longstanding position that California continues to need its own nonroad engine emission program to meet serious air pollution problems.³⁵ Based on the lack of evidence in the record or any suggestion that CARB no longer has a need for its standards to meet compelling and extraordinary conditions, we have no reason to deny CARB's authorization request based on this second authorization criterion.

³⁴ See 74 FR 32744, 32761 (July 8, 2009); 49 FR 18887, 18889–18890 (May 3, 1984).

³⁵ See CARB's Authorization Support document at 15, *citing* CARB Board Resolution 11-30.

Section 209(e)(2)(A)(iii) of the Act instructs that EPA cannot grant an authorization if California's standards and enforcement procedures are not consistent with "this section." As described above, EPA's section 209(e) rule states that the Administrator shall not grant authorization to California if she finds (among other tests) that the "California standards and accompanying enforcement procedures are not consistent with section 209." EPA has interpreted the requirement to mean that California standards and accompanying enforcement procedures must be consistent with at least section 209(a), section 209(e)(1), and section 209(b)(1)(C), as EPA has interpreted this last subsection in the context of motor vehicle waivers.³⁶ Thus, this can be viewed as a three-pronged test.

1. Consistency with Section 209(a)

Section 209(a) of the Clean Air Act prohibits states or any political subdivisions of states from setting emission standards for new motor vehicles or new motor vehicle engines. Section 209(a) is modified in turn by section 209(b) which allows California to set such standards if other statutory requirements are met. To find a standard to be inconsistent with section 209(a) for purposes of section 209(e)(2)(A)(iii), EPA must find that the standard in question actually regulates new motor vehicles or new motor vehicle engines. In its authorization request, CARB stated that by definition, the CHE amendments do not regulate new motor vehicles or new motor vehicle engines. EPA received no comments to suggest the contrary. Therefore, EPA cannot deny California's request based on the CHE amendments being inconsistent with section 209(a) of the Act.

2. Consistency with Section 209(e)(1)

³⁶ See 59 FR 36969 (July 20, 1994).

To be consistent with section 209(e)(1), California's standards or other requirements relating to the control of emissions must not relate to new engines which are used in farm or construction equipment or vehicles and which are smaller than 175 horsepower (hp), and new locomotives or new engines used in locomotives.

CARB maintains that its CHE amendments do not regulate new engines which are used in construction or farm equipment or vehicles below 175 hp, nor do the CHE amendments regulate new locomotives or new engines used in locomotives.

In light of the lack of contrary information in the record, EPA cannot make a finding that CARB's CHE amendments are inconsistent with section 209(e)(1). Therefore, EPA cannot deny CARB's authorization request on this basis.

3. Consistency with Section 209(b)(1)(C)

The requirement that California's standards be consistent with section 209(b)(1)(C) of the Clean Air Act effectively requires consistency with section 202(a) of the Act. To determine this consistency, EPA has applied to California nonroad standards the same test it has used previously for California motor vehicle standards; namely, state standards are inconsistent with section 202(a) of the Act if there is inadequate lead-time to permit the development of technology necessary to meet those requirements, giving appropriate consideration to the cost of compliance within that timeframe. California's accompanying enforcement procedures would also be inconsistent with section 202(a) if federal and California test procedures conflicted. The scope of EPA's review of whether California's action is consistent with section 202(a) is narrow. The determination is limited to whether those opposed to the authorization or waiver have met their burden of establishing that California's standards are technologically infeasible, or that

California's test procedures impose requirements inconsistent with the federal test procedures.³⁷

CARB states that the smoke opacity test is a quick and inexpensive way to detect if an engine is emitting excessive emissions. CARB maintains that the smoke opacity test is technologically feasible and that compliance with the standards does not require the incorporation of any new technology not already required by existing regulations that have previously received an EPA authorization. CARB also states that the clarification of the Tier 4 FEL emission standards provisions are technologically feasible and were designed to correct an unintentional error and to clarify the original intent of the previously authorized CHE regulations. The CHE amendments only require retrofit to the Tier 4 emission level if appropriate technology is available and require the retrofit be performed within one year. EPA did not receive any comment or evidence to suggest that either of the two amendments for which CARB requested authorization is technologically infeasible.

Consequently, based on the record, EPA is unable to make the finding that the CHE amendments are not technologically feasible with the available lead time giving consideration to the cost of compliance.

EPA received no comments suggesting that CARB's CHE amendments pose any test procedure consistency problem. Therefore, based on the record, EPA cannot find that CARB's testing procedures are inconsistent with section 202(a) and cannot deny CARB's request based on this criterion.

III. Decision

³⁷ See, e.g., *Motor and Equip. Mfrs Assoc. v. EPA*, 627 F.2d 1095 (D.C. Cir. 1979) (“*MEMA I*”).

The Administrator has delegated the authority to grant California section 209(e) authorizations to the Assistant Administrator for Air and Radiation. After evaluating CARB's amendments to its CHE regulations described above and CARB's submissions for EPA review, EPA is taking the following actions.

First, EPA is granting a within-the-scope authorization for the CHE amendments that modify the retrofit requirements, modify operational practices, allow demonstration of emissions equivalency for alternative technology, and modify compliance requirements.

Second, EPA is granting a full authorization for the CHE amendments that establish a new opacity based monitoring program and new retrofit requirements for engines meeting the Tier 4 FEL standards.

This decision will affect persons in California and those manufacturers and/or owners/operators nationwide who must comply with California's requirements. In addition, because other states may adopt California's standards for which a section 209(e)(2)(A) authorization has been granted if certain criteria are met, this decision would also affect those states and those persons in such states. *See* CAA section 209(e)(2)(B). For these reasons, EPA determines and finds that this is a final action of national applicability, and also a final action of nationwide scope or effect for purposes of section 307(b)(1) of the Act. Pursuant to section 307(b)(1) of the Act, judicial review of this final action may be sought only in the United States Court of Appeals for the District of Columbia Circuit. Petitions for review must be filed by **[INSERT 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Judicial review of this

final action may not be obtained in subsequent enforcement proceedings, pursuant to section 307(b)(2) of the Act.

IV. Statutory and Executive Order Reviews

As with past authorization and waiver decisions, this action is not a rule as defined by Executive Order 12866. Therefore, it is exempt from review by the Office of Management and Budget as required for rules and regulations by Executive Order 12866.

In addition, this action is not a rule as defined in the Regulatory Flexibility Act, 5 U.S.C. § 601(2). Therefore, EPA has not prepared a supporting regulatory flexibility analysis addressing the impact of this action on small business entities.

Further, the Congressional Review Act, 5 U.S.C. § 801, *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, does not apply because this action is not a rule for purposes of 5 U.S.C. § 804(3).

Dated: April 29, 2015.

Janet G. McCabe,
Acting Assistant Administrator,
Office of Air and Radiation.
[FR Doc. 2015-11034 Filed: 5/6/2015 08:45 am; Publication Date: 5/7/2015]